

P.E.R.C. NO. 99-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIRVIEW FREE PUBLIC LIBRARY,

Respondent,

-and-

Docket No. CO-H-98-28

CWA LOCAL 1045, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Fairview Free Public Library violated the New Jersey Employer-Employee Relations Act when it eliminated paid holidays for part-time employees and modified bereavement leave conditions after CWA Local 1045, AFL-CIO filed a representation petition. The Commission concludes that the tendency of the elimination of paid holidays to interfere with the rights of employees to file a representation petition and to vote in a fair election outweighed the employer's need to act during representation proceedings. The Commission orders the Library to rescind the Library Board resolutions of June 23, 1997 eliminating holiday pay for part-time employees and modifying bereavement leave conditions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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In the Matter of

FAIRVIEW FREE PUBLIC LIBRARY,

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Docket No. CO-H-98-28

CWA LOCAL 1045, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Giblin & Giblin, attorneys (John L. Schettino, of counsel)

For the Charging Party, Weissman & Mintz, attorneys (Judianne Chartier, of counsel)

DECISION

On July 21, 1997, CWA Local 1045, AFL-CIO, filed an unfair practice charge against the Fairview Free Public Library. The charge alleges that the Library violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4) and (7),^{1/} by eliminating

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

paid holidays for part-time employees and modifying bereavement leave conditions after CWA filed a representation petition.

On November 12, 1997, a Complaint and Notice of Hearing issued. On November 19, the Library filed an Answer asserting that the changes in benefits were discussed months before CWA made its representation request and were not a response to that request.

On March 25, 1998, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. Post-hearing briefs were received by July 23.

On August 3, 1998, the Hearing Examiner issued his report. H.E. No. 99-3, 24 NJPER 435 (¶29201 1998). He concluded that the Library was not hostile to CWA's petition and the changes were not discriminatorily motivated. He therefore recommended dismissal of the allegations that 5.4a(2), (3), (4) had been violated. He concluded, however, that the Library violated 5.4a(1) by eliminating holiday pay for part-time employees and modifying bereavement leave conditions after CWA filed its petition: he found that these changes tended to interfere with the employees' right to seek representation and were not justified by legitimate and substantial business reasons.

On August 12, 1998, the Library filed exceptions to the finding of a 5.4a(1) violation. It asserts that the Hearing Examiner erred in: not requiring a showing that the elimination of holiday pay actually interfered with representational rights; not holding that the Library could eliminate holiday pay for its

part-time employees since the Borough of Fairview had eliminated such pay for its part-time employees; not finding that financial hardships justified the elimination of holiday pay; not considering the sequence of events leading to the elimination of holiday pay; and requiring the Library to implement a holiday policy it had not adopted.

CWA filed an untimely response without the Library's consent and without a motion showing good cause for a late filing. We do not consider that response.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-13) are accurate. We adopt and incorporate them. We add to finding no. 2 that the practice before the elimination of holiday pay for part-time employees was to pay all employees for each holiday, regardless of how many hours they worked during the week or what day of the week the employee was scheduled to work (T64; T74; T138). We add to finding no. 9 that the Borough raised taxes by 26 points in 1995 and by 47 points in 1996. On a house assessed at \$200,000, those point increases resulted in tax increases of about \$500 in 1995 and \$1,000 in 1996 (T87-T88).

In the absence of exceptions from CWA, we adopt the Hearing Examiner's recommendation that we dismiss the alleged violations of 5.4a(2), (3), (4) and (7). In the absence of exceptions from the Library, we adopt the Hearing Examiner's recommendation that we find a violation of 5.4a(1) based on the

change in bereavement leave conditions. We thus concentrate on whether we should find a violation of 5.4a(1) based on the elimination of holiday pay after CWA filed a representation petition and before a representation election could be held.

Section 5.3 entitles public employees to form, join or assist employee organizations or to refrain from forming, joining or assisting employee organizations. Employees may ask their employer to recognize a majority representative to negotiate on their behalf or may ask the Commission to conduct a representation election and certify a majority representative. Id; see also N.J.S.A. 34:13A-6(d).

Section 5.4a(1) prohibits public employers from interfering with, restraining or coercing employees in the exercise of their rights to seek representation and vote in a fair election. In determining whether an employer has violated 5.4a(1), we must first determine whether the disputed action tends to interfere with the statutory rights of employees. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).^{2/} If the answer to that question is yes, we must then determine whether the employer has a legitimate operational

^{2/} We need not determine whether an action actually interfered or was intended to interfere with employee rights. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). Accord American Freightways Co., 124 NLRB 146, 44 LRRM 1302 (1959). See generally Hardin, The Developing Labor Law, 76 (3d ed. 1992); Gorman, Basic Text on Labor Law, 132-133 (1976).

justification. If the employer does have such a justification, we will then weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act. See, e.g., State of New Jersey (Dept. of Corrections, P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997)). See also Gorman at 133.

We first consider whether eliminating holiday pay during a representation proceeding tended to interfere with the representational rights of Library employees. We find that it did.

Employees have rights protected by the Act to file a representation petition and to vote in a free and fair election. Both rights are jeopardized by cutting compensation or eliminating economic benefits during the period between a representation petition and a representation election. See NLRB v. Hudson Transit Lines, 429 F.2d 1223, 74 LRRM 2797, 2802 (3d Cir. 1970), cert. den. 401 U.S. 911 (1971); American Freightways; cf. Plastronics Inc., 233 NLRB No. 23, 96 LRRM 1422 (1977) (during representation proceeding, employer illegally stated it would "bargain from scratch" if union won, thereby threatening employees with loss of paid vacations and other benefits); cf. Camden Housing Auth., P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987) (employer interfered with employee rights by eliminating increment system day before Commission certified election results). See also Gorman at 168-169.

The Library's part-time employees received paid holidays for several years, first pursuant to a collective negotiations agreement with a different union and then pursuant to an employee manual memorializing assurances in March and April 1996 from the Library's Board of Trustees and its Executive Director that these benefits would remain unchanged. On December 19, 1996, the Mayor and Borough Council passed a resolution eliminating personal days, health benefits, and paid holidays for part-time municipal employees. Although the Library Director told employees that she was "fairly certain" that the Board would implement this policy, the resolution was not binding on the Library and was not effective until approved by its trustees.

When the resolution was presented at the trustees' meeting in January 1997, it was not approved -- some trustees were "uncomfortable" with it and wanted a legal opinion. The Library Director told employees that they would still be getting holiday pay until such an opinion was received. At the next four monthly meetings -- February, March, April and May -- the trustees did not resolve to eliminate holiday pay for part-time employees and a vote was put off at the April meeting because attendance was low and the resolution might have failed.

The Board did not take up holiday pay again until after CWA sought recognition and filed its representation petition on May 30, 1997. At its June meeting, the Board first voted to

consent to an election (rather than grant recognition) and next voted to eliminate holiday pay for part-time employees.^{3/}

Under these circumstances, we believe that the elimination of holiday pay tended to interfere with representational rights. The Board eliminated holiday pay shortly after the petition was filed, immediately after announcing its response to the petition, and shortly before an election was held. Employees could reasonably believe that the elimination of benefits was a reaction to the petition and a discouragement to voting for union representation now or filing another petition later. NLRB v. Hudson Transit Lines.

We next consider whether the Library had a legitimate interest in eliminating holiday pay. We find it did, but that interest did not require it to eliminate the benefit while the representation petition was pending.

The Library is a separate employer from the Borough -- the Library was not compelled to implement the Borough's resolution or follow its lead. Moreover, the Library was not simply carrying out a decision already made before the petition was filed. The Library did have budgetary problems, but these problems had not prompted action at the five monthly meetings

^{3/} The Board also voted to eliminate health benefits for future part-time employees working less than 30 hours a week. The Board thus departed company from the Borough Council, which had eliminated health benefits for all part-time Borough employees, without grandfathering anyone or referring to the number of hours worked.

following the Borough's resolution and the record does not evidence any sudden urgency necessitating action at the June meeting. NLRB v. Hudson Transit Lines; Speco Corp., 298 NLRB No. 56, 134 LRRM 1103 (1990). Delaying the elimination of holiday pay until after an election was held would have preserved its employees' representational rights without ultimately preventing the Board from addressing its budgetary needs consistent with its statutory obligations. See Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); cf. Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 457-459, 461 at n. 25 (¶14196 1983) (employer violated 5.4a(1) by negotiating with incumbent union while rival union's petition was pending; quick processing of representation petitions warrants brief delay in negotiations to ensure fair election).

Under all the circumstances, we conclude that the tendency of the elimination of paid holidays to interfere with the rights of employees to file a representation petition and to vote in a fair election outweighed the employer's need to act during representation proceedings. The elimination of holiday pay thus violated 5.4a(1).

The Library asserts that the Hearing Examiner's recommended remedy would require it to implement a holiday pay policy it never adopted. It asserts that the employee manual prepared by a library assistant differs in wording from the collective negotiations agreement on which the manual was based and that, given this difference, it should not be obligated to pay

employees for holidays falling on days they would not otherwise have worked. The wording is different, but the meaning is not. The parties' practice was to pay part-time employees for the holidays listed in the contract and the manual, regardless of whether they were scheduled to work on those days. It is that practice that must be reinstated, subject to being changed through negotiations.^{4/}

In the absence of other exceptions, we adopt the recommended order.

ORDER

The Fairview Free Public Library is ordered to:

A. Cease and desist from interfering with, restraining or coercing Library employees in the exercise of their representational rights, particularly by eliminating holiday pay for part-time employees and modifying bereavement leave conditions while a representation petition was pending.

B. Take these actions:

1. Rescind the Library Board resolutions of June 23, 1997 eliminating holiday pay for part-time employees and modifying bereavement leave conditions;

2. Reinstate holiday pay for part-time employees, pending negotiations with CWA Local 1045;

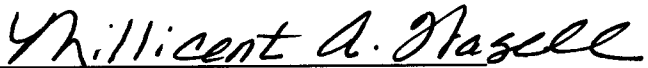
^{4/} CWA was certified as majority representative on August 25, 1997.

3. Reinstate bereavement leave conditions in effect before July 1, 1997, pending negotiations with CWA Local 1045.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials; and

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Library has taken to comply with this order.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: November 23, 1998
Trenton, New Jersey
ISSUED: November 24, 1998



NOTICE TO EMPLOYEES



**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing Library employees in the exercise of their representational rights, particularly by eliminating holiday pay for part-time employees and modifying bereavement leave conditions while a representation petition was pending.

WE WILL rescind the Library Board resolutions of June 23, 1997 eliminating holiday pay for part-time employees and modifying bereavement leave conditions.

WE WILL reinstate holiday pay for part-time employees, pending negotiations with CWA Local 1045.

WE WILL reinstate bereavement leave conditions in effect before July 1, 1997, pending negotiations with CWA Local 1045.

Docket No. CO-H-98-28

FAIRVIEW FREE PUBLIC LIBRARY
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 99-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIRVIEW FREE PUBLIC LIBRARY,

Respondent,

-and-

Docket No. CO-H-98-28

CWA LOCAL 1045, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a public employer violated 5.4a(1) of the Act by eliminating holiday pay and changing rules for bereavement leave during the pendency of a representation petition. The Hearing Examiner found that the employer did not prove that the timing of the decision to eliminate the benefits was for a legitimate and substantial business justification.

The Hearing Examiner dismissed charges that the employer's conduct was in retaliation for the exercise of protected rights.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIRVIEW FREE PUBLIC LIBRARY,

Respondent,

-and-

Docket No. CO-H-98-28

CWA LOCAL 1045, AFL-CIO,

Charging Party.

Appearances:

For the Respondent,
Giblin & Giblin, attorneys
(John L. Schettino, of counsel)

For the Charging Party,
Bernice Krawczyk, President
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel, on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 21, 1997, CWA Local 1045, AFL-CIO, filed an unfair practice charge against the Fairview Free Public Library. The charge alleges that on June 23, 1997, immediately after discussing CWA's "election petition and request for recognition", the Library Board of Trustees changed library employees' terms and conditions of employment by eliminating holiday pay and modifying rules for funeral leave. The charge also alleges other unspecified changes. The Library's actions allegedly violate

subsections 5.4a(1), (2), (3), (4) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On November 12, 1997, a Complaint and Notice of Hearing issued. On November 19, the Library filed an Answer denying the alleged violations. It asserts that the "changes" were discussed by the Library in January 1997 and were not in retaliation to the request for recognition.

On March 25, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by July 20, 1998. The Library filed a reply letter on July 23, 1998.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Fairview Free Public Library is a public employer within the meaning of the Act. CWA Local 1045 is a public employee representative within the meaning of the Act.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

2. All library employees were represented by NJELU No. 1/SEIU Local 1988 under a 1994-95 collective agreement with "The Borough of Fairview/The Fairview Library Board" (CP-1).^{2/} The expired agreement had a holiday pay provision (Article VI) with formulas for full-time and part-time employees. The agreement also had a bereavement leave provision (Article XV).

3. On September 27, 1995, library employees filed a decertification petition (RD-96-4). NJELU No. 1/SEIU Local 1988 filed a disclaimer of interest, which the Director of Representation approved on October 27, 1995.

4. On March 19, 1996, the Library Board president William Hummel wrote a letter to Leslie Maryon-Larose, a library assistant who had "requested information" concerning "salary increases, updated vacation/sick days and contract agreement" (CP-2). Hummel wrote that a 5% wage increase was included in the proposed 1996 Library budget. His letter cautioned that "based on our last year with the severe cut in the final amount we received, there is no guarantee this year's submission will fare any better" (CP-2). He also wrote, "At the time of the staff's decision to opt out of the union, both the Board of Trustees and the Director assured you that all provisions of the last contract (1994-95) would be honored. We anticipate no change to that assurance" (CP-2).

^{2/} "CP" represents charging party exhibits followed by the exhibit number; "T" represents transcript, followed by the page number(s).

5. Every department in the Borough of Fairview receives funding from the Borough (T90). The Library Board submits its proposed annual budget to the Mayor and Council for approval (T97).^{3/} In 1995 and 1996, the Borough suffered a loss of State aid, known as "density" aid (T88). In response, the Borough increased property taxes, eliminated some positions and reduced others to part-time (T89-T90).

6. On April 12, 1996, Arlene Sahraie, the Library Director, sent a letter to Maryon-Larose, advising that "the lack of a union contract" was discussed on April 11 at the monthly Library Board of Trustees meeting. Sahraie wrote,

The Board would like you to put together some sort of employee manual following the guideline of your past contract. Obviously, the grievance

^{3/} N.J.S.A. 40:54-12, Libraries and Reading Rooms: Trustees, Powers; Employees, provides, in relevant part:

The board shall hold in trust and manage all property of the library. It may rent rooms, or, when proper, construct buildings for the use of the library, purchase books, pamphlets, documents, papers and other reading matter, hire librarians, and other necessary personnel, and fix their compensation, make proper rules and regulations for the government of the library, and generally do all things necessary and proper for the establishment and maintenance of the free public library in the municipality.... (emphasis added).

That the Borough is the funding source does not suggest that it also undertakes the statutory obligations of the Library. The facts indicate that the Library is the public employer. See Bor. of Bloomingdale, D.R. No. 88-4, 13 NJPER 689 (¶18258 1987); Bor. of Carteret, D.R. No. 96-16, 22 NJPER 184 (¶27096 1996).

procedure would be different. But holidays, pay scale, sick and vacation time, and other areas should remain the same. [CP-4]

Sahraie requested that the "manual" be prepared by the May 9, 1996 Board meeting.

7. On April 15, 1996, Sahraie issued a letter to the library staff, advising of the proposed "manual", and soliciting staff assistance to Maryon-Larose, described as an unofficial "shop steward" (CP-3).

8. During the spring of 1996, Maryon-Larose prepared the "Fairview Free Public Library Board Policy Book" (T30; CP-5). Some provisions were modified by the Library (T27; T119). In particular, the Library required that commencement and termination dates be deleted because the document was to be a "manual" and not a "contract" (T29). In its final form, it repeats numerous provisions of the expired NJELU No. 1/SEIU Local 1988 agreement. Absent from it were recognition and term articles and a signature page (CP-5). Although the Library never formally adopted the "policy book", it was used for "personnel practices" (T115; T119; T130).

Among the articles in the policy book are;

Article IV - Work Week

B. A minimum of two Library Assistants shall be scheduled to work at all times except in the event of sickness.

Article V - Holidays

A. An employee shall be entitled to holiday leave of absence with pay in celebration of the holidays set forth below:

New Year's Day
Martin Luther King Day
Lincoln's Birthday
Washington's Birthday
Good Friday
Independence Day
Labor Day
Columbus Day
Veteran's Day
General Election Day
Thanksgiving Day and the following day
Christmas Day

B. Holiday pay shall be equal to the greatest number of hours scheduled to be worked in any one day by the employee during the week in which a holiday falls.

C. If a holiday falls on a Saturday or Sunday, it shall be celebrated on the preceding Friday or the following Monday.

Article X - Hospitalization & Insurance Benefits

A. The Board shall provide health benefits coverage to employees who are required to work twenty (20) or more hours per week on a regular basis. The coverage to be provided shall be identical to the benefits provided in the New Jersey Health Benefits Plan covering employees.

In the event that the insurance carrier presently carrying the hospitalization and medical insurance for the Board shall refuse to carry or continue said insurance coverage, the Board shall immediately apply to a new insurance company for the identical insurance as is now provided and shall provide that there shall be no interruption of the insurance coverage.

Article XIV - Bereavement Leave

Employees shall be entitled to three (3) working days leave with pay to attend or make arrangements for the funeral of a member of their immediate family. Immediate family is defined as, and limited to, spouse, son, daughter, mother, father, brother, sister, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparents,

grandchildren or any other relative residing in the employee's household. [CP-5]

9. On December 19, 1996, the Fairview Mayor and Council passed a resolution stating that "all part-time employees shall not be entitled to personal days, health benefits and paid holidays..." (CP-6). The resolution applied to Borough employees, specifically, and was intended to cushion, along with other personnel actions, a falling municipal economy (T88-T90; T109). A copy of the resolution was promptly delivered to Library Director Sahraie (T108-T109).

Sahraie informed library employees of the resolution and they asked her if it applied to them. She replied that she was "fairly certain that the Library Board would be implementing this policy" (T109-T110).

10. Between 1994 and 1997, the Library Board spent about \$1,000,000 acquiring and renovating a building to serve as a new library. In early 1997, the Library Board had no money to furnish the facility (T113-T114). Nothing in the record suggests how or if the funds were obtained.

11. On January 9, 1997, the Library Board of Trustees, which included Mayor Vincent Bellucci, and Mr. Frank Pizzichillo, conducted its monthly meeting and went into "closed session" to discuss "a resolution recently adopted by the Mayor and Council regarding benefits to part-time employees" (CP-7). Library Director Sahraie and library employees Quinn, Duque and Sciancalepore also attended (T99).

Sciancalepore asked the Board in the closed session if holiday pay will be eliminated for part-time employees. The Mayor replied that it was unfair for part-time library employees to keep the benefit when it had been eliminated in other departments (T100).^{4/}

Some trustees were "uncomfortable" with the resolution and wanted an opinion from the Borough attorney. No vote was taken on the resolution (T17; T111; T133). Library Director Sahraie was directed to seek the Borough attorney's written opinion on the issue (T134).

12. On January 10, 1997, library employee Sciancalepore told Maryon-Larose that she attended the Library Board of Trustees meeting the previous night (T82-T83). Maryon-Larose then asked Sahraie if the library employees "still have our paid holidays" and was told that "for the present, until they got an opinion from the Borough attorney, they were going to continue receiving holiday pay" (T78; T112).

13. The Library Board did not discuss or vote on ending holiday pay for part-time employees at its February 1997 meeting. The issue was not discussed because the Library Board was

^{4/} The Mayor first asked Sciancalepore if she was inquiring about holiday pay in the capacity of attorney or union representative. She answered that she was appearing "to speak for the employees." He replied, "I don't think you can speak for the employees, but [you] could speak for [your]self." She agreed and the Mayor answered her question (T99-T100).

preoccupied by other problems. The issue, according to Board member Pizzichillo, "was just basically put off a little bit at that time" (T134-T135).

Discussion and vote was also deferred at the March 1997 Library Board meeting (T135). Neither the Mayor nor Library Board president attended the meeting (T135).

Discussion and vote was also deferred at the April 1997 meeting because only five of nine Board members attended and one member might have voted against eliminating the benefit (T135-T136).

The Library Board members discussed the matter at its May 8, 1997 meeting but "once again the Mayor wasn't there...and it just was put off again, basically" (CP-9; T136).

14. On May 27, 1997, CWA representative Bernice Krawczyk mailed a letter to the Library Board president requesting a "voluntary recognition in lieu of an election" (CP-8). The letter also advised that a representation petition had been mailed to the Commission and that a copy was enclosed.

On May 30, 1997, CWA's representation petition was filed at the Commission (RO-97-119). The petition sought a unit of "all employees of the Fairview Free Public Library."

15. On June 23, 1997, the Library Board addressed "new business", as set forth verbatim, in the minutes of that regular monthly meeting.

7. NEW BUSINESS: The Library staff's request for representation by the Communication Workers of America, Local 1045 was discussed. This being a matter of personnel, Mayor Bellucci made a

motion to go into closed session. Motion was seconded by Mr. Weise. Motion carried.

A motion was made by Mr. Pizzichillo that there be an official election to determine who shall represent the library workers of the Fairview Free Public Library. Seconded by Mr. Weise.

ROLL: Ayes: Herr, Hummel, Pizzichillo,
 Salemme, Weise, Bellucci, Caufield
 Nays: None
 Absent: Juliano, Nuccio

Motion carried.

A motion was made by Mr. Pizzichillo to eliminate the policy of paying part-time library employees for holidays effective July 1, 1997. Seconded by Mr. Weise.

Discussion followed. Mr. Herr suggested grandfathering in the current employees but not giving holiday benefits to future employees.

ROLL: Ayes: Pizzichillo, Salemme, Weise,
 Bellucci, Caufield
 Nays: Herr, Hummel
 Absent: Juliano, Nuccio

Motion carried.

Mr. Pizzichillo made a motion that Article IV, Section B of the Board Policy Manual be changed to "There shall be two library assistants scheduled whenever deemed necessary by the Library Director." Seconded by Mr. Caufield.

ROLL: Ayes: Herr, Hummel, Pizzichillo,
 Salemme, Weise, Bellucci, Caufield.
 Nays: None
 Absent: Juliano, Nuccio

Motion carried.

Mr. Pizzichillo made a motion that Article V, Section C of the Board Policy Manual be changed to: If a legal holiday falls on Saturday or Sunday, it shall be celebrated on the same day as celebrated by Borough employees. Seconded by Mr. Hummel.

ROLL: Ayes: Herr, Hummel, Pizzichillo,
 Salemme, Weise, Bellucci, Caufield
 Nay: None
 Absent: Juliano, Nuccio

Motion carried.

Mr. Pizzichillo made a motion that Article X, Section A be changed to: The Board shall provide health benefits coverage to employees who are required to work thirty (30) or more hours per week on a regular basis. The coverage to be provided shall be identical to the benefits provided in the New Jersey Health Benefits Plan covering employees.

All employees presently receiving health benefits are grandfathered in and shall continue to receive these benefits. Motion seconded by Mr. Weise.

ROLL: Ayes: Herr, Hummel, Pizzichillo,
 Salemme, Weise, Bellucci, Caufield.
 Nays: None
 Absent: Juliano, Nuccio

Motion carried.

Mr. Pizzichillo made a motion to eliminate entirely Article V, Section B of the Board Policy Manual. Seconded by Mr. Weise.

ROLL: Ayes: Pizzichillo, Salemme, Weise,
 Bellucci, Caufield.
 Nays: Herr, Hummel
 Absent: Juliano, Nuccio

Motion carried.

A motion was made by Mr. Pizzichillo to change Article XIV of the Board Policy Manual to: Employees shall be entitled to three (3) working days leave with pay to attend or make arrangements for the funeral of a member of their immediate family. Such leave shall be contiguous to the date of death. Immediate family is defined as, and limited to, spouse, son, daughter, mother, father, brother, sister, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law,

grandparents, grandchildren, or any other relative residing in the employee's household. Seconded by Mr. Weise.

ROLL: Ayes: Herr, Hummel, Pizzichillo,
 Salemme, Weise, Bellucci, Caufield.
 Nays: None
 Absent: Juliano, Nuccio

Motion carried.

No part-time library employee received holiday pay after July 1, 1997 (T104). No evidence suggests that any other change to the policy manual approved at the June 23 meeting was not implemented.

16. On June 30, 1997, the parties signed a consent agreement for an election to choose a representative among a unit of "all regularly employed full-time and part-time employees" of the Fairview Free Public Library.

17. On July 21, 1997, CWA Local 1045 filed a "request to proceed" with the Commission. The request form asks the Commission to continue processing the representation petition (see finding #14), despite the filing of the unfair practice charge. The form also states, "it is understood that the Commission will not entertain objections to any election in this matter based upon conduct alleged in the above charge."

18. On August 15, 1997, a majority of employees cast ballots in favor of CWA, Local 1045. On August 25, a certification was issued for the unit of "all regularly employed full-time and part-time employees employed by the Fairview Free Public Library."

19. The Library Board does not meet in July and August (T123).

ANALYSIS

Both a request for recognition as majority representative and a filing of a representation petition are activities protected by the Act. Retaliation against employees for engaging in such activities violates the Act. N.J.S.A. 34:13A-5.4a(3) and (4).

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee(s) engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct.

Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

CWA Local 1045 alleges that the Library's elimination of holiday pay to part-time employees and changing funeral leave benefits was in retaliation for the request for recognition and/or the filing of a representation petition. But the only possible evidence of hostility between May 27, 1997 (CWA's request for recognition) and June 23, 1997 (the Library's withdrawal of benefits) is the timing of the withdrawal of benefits and the timing of the Library's discussion of the withdrawal, which immediately followed its decision not to recognize CWA as majority representative.

Timing is a factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In this case, it is the only factor and I find it insufficient to show hostility. No other evidence suggests anti-union animus between May 27 and June 23, 1997. No improper motive can be gleaned from the Library's refusal to recognize CWA as majority representative. Nor is there evidence of hostility before May 27 which suggests an anti-union predisposition among Library Board members, individually or collectively. On the contrary, the Library demonstrated a respect for its employees by encouraging the creation of the "policy book."

Assuming that the timing of the discussion and the withdrawal of benefits demonstrates hostility, I find that the Library would have withdrawn the benefits anyway. The evidence shows that the Library considered the disputed action months before the CWA requested recognition. Eliminating holiday pay to part-time employees was consistent with how unrepresented part-time Borough employees were treated, in light of exigent economic circumstances. And both Borough employees and Library employees swim in the same budgetary pool.

Accordingly, I decline to find that the Library violated 5.4a(2), (3) and (4) of the Act.

Under another standard of conduct, one required by subsection 5.4a(1), the timing of the Library's elimination of benefits is questionable. An employer violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. N.J. Sports and Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 115, 116, (¶18050 1987). The tendency of the employer's conduct, and not its result or motivation, is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-26, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983).

The filing of a representation petition signals the start of a period in which the Commission is concerned about "conduct which has a strong tendency to jeopardize the atmosphere necessary for a fair election..." Passaic Valley Sewerage Comm., P.E.R.C. No.

81-51, 6 NJPER 504, 505 (¶11258 1980). For example, the Commission has set aside representation elections when employers promised or granted benefits to employees prior to those elections. Bor. of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1988); Passaic Valley Sewerage Comm.; see also, Bor. of Neptune City, D.R. No. 97-3, 22 NJPER 345 (¶27179 1996). Conduct upsetting "laboratory conditions" and invalidating the results of an election does not necessarily violate subsection 5.4a(1). Generally, the latter violation requires an attribution of fault. See Hardin, The Developing Labor Law at 86 (3rd ed. 1992).

This case concerns an elimination of benefits during a pre-election period, which allegedly violates 5.4a(1) of the Act. In NLRB v. Hudson Transit Lines, 429 F.2d 1223, 74 LRRM 2797 (3rd Cir. 1970), cert. den. 401 U.S. 911 (1971),^{5/} the Court sustained the NLRB's finding that an employer violated section 8(a)(1) of the Labor-Management Relations Act by reducing employee benefits during the pendency of a representation proceeding.^{6/} The Court identified the employees' interest:

^{5/} In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), the New Jersey Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

^{6/} In the case, the incumbent employee representative and a petitioner contested to represent the employees. The election was conducted about one week before the contract expired. Challenged ballots caused a ten week delay in the Board's issuance of a certification of results. During that period, the employer reduced benefits.

The potential for adverse impact in the employer's conduct...is the indication to employees that by engaging in a representation proceeding, and incurring the risk that an unresolved election may leave the employees temporarily without a representative, the employees will for that period be vulnerable to a reduction in salary and other benefits through the unilateral action of the employer. Because of the employee recognition of this vulnerability to serious reduction in economic benefits during the period when a representation election remains unresolved, the Board was justified in concluding that 'employees would tend to think twice before again engaging in a representation proceeding.'

[74 LRRM 2802]

The Court also sustained the finding that the employer's proffered reason for acting, "the need to make current operating expenses meet current revenues, because of the lack of assurance of summer operations," did not demonstrate a "legitimate and substantial" business justification.

Beginning in December 1996, all library employees were aware that part-time employees could lose holiday pay. Yet they were assured by the employer that these benefits would continue, at least until a legal opinion was delivered. Months lapsed without the Library Board acting, thereby leaving intact holiday pay and other benefits enumerated in the "Fairview Free Public Library Board Policy Book." Employees could reasonably question the likelihood of losing holiday pay. In June 1997, slightly more than three weeks after the representation petition was filed, and seven weeks before the election results were known, the Library Board eliminated the benefit. Under these circumstances, I must conclude that all

library employees, including part-time employees, would "tend to think twice" about filing another representation petition.

One may also analogize the Library Board's actions in June 1997 to a "bargaining from scratch" statement made during the pendency of a representation petition which the NLRB has found to constitute an unlawful threat in several cases. See Hardin, The Developing Labor Law at 113-114 (3rd ed. 1992). For example, in Beverly Enterprises-Indiana, Inc., 124 LRRM 1366 (1986), the employer said that bargaining "starts out fresh....you don't start with what's in the handbook [of benefits]" Id. at 1367. The personnel director held up the handbook and waved it while making the comments. The NLRB found that this conduct was an implied threat, violating section 8(a)(1). See also, Mississippi Chemical Corp., 123 LRRM 1340 (1986); Plastronics, Inc., 93 LRRM 1422 (1977).

More convincing than a threat, the Library Board's withdrawal of holiday pay to part-time employees before the election meant that it was reducing benefits before the start of negotiations, if the CWA won. Such conduct tends to interfere with employees' statutory rights.

The Library's reason for eliminating holiday pay to part-time employees was to reduce spending. This explanation does not justify the timing of the decision. Eliminating the benefit anytime before the request for recognition was received would have

been lawful.^{7/} A firm decision to eliminate the benefit before the request was received and implemented afterward could be lawful, depending on the justification for the delay. But the Library Board repeatedly deferred its decision to eliminate holiday pay for a reason it alone controlled -- inadequate support and attendance at the monthly meetings.

Other reasons given for the timing of the decision -- the request for a legal opinion, a preoccupation with other Library matters, and the unrelated fact that the Library Board does not meet in July and August -- are similarly unpersuasive. No evidence indicates when the legal opinion was conveyed; I can only infer that it was conveyed because the Library eventually acted. The Library's

^{7/} CWA contends that the Library employees functioned as an "employee organization" under N.J.S.A. 34:13A-3(e) between the filing of the decertification petition and the filing of the representation petition. In effect, the "Fairview Free Public Library Board Policy Book" was a "collective agreement" and the Board's failure to negotiate changes in its terms allegedly violates 5.4a(5) of the Act.

I disagree. Having previously participated in a representation case, and in collective negotiations leading to a contract, and in a decertification case, Library employees were aware of the differences between being represented and not represented by an "employee organization." CWA did not write in its representation petition that Library employees were "currently" represented by any employee organization. Nor did any organization except CWA appear on the ballot in that matter (RO-97-119).

No termination date appears in the "policy book" and the evidence does not prove that its terms were derived directly from a "give and take" between the employees and the Library Board. See West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 33 (¶77 1973). Finally, CWA did not allege that the Library violated 5.4a(5).

preoccupation with other matters accounts for only one month's delay. And after allowing more than five months to lapse before eliminating the benefits, the Library felt compelled to vote in anticipation of a summer hiatus. No evidence explains the necessity for action at that time. Accordingly, I find that the Library has not carried its burden of proving that in June 1997 -- after the petition was filed -- it had a legitimate and substantial business justification for eliminating holiday pay to part-time employees and changing rules for funeral leave.

RECOMMENDATION

I recommend that the Commission find that the Fairview Free Public Library violated 5.4a(1) of the Act when it eliminated holiday pay to part-time employees and modified rules for funeral leave set forth in the Library Board Policy Book. I recommend that the remaining allegations in the Complaint be dismissed.^{8/}

^{8/} CWA contends in its brief that Library Director statements in October 1997 also violate 5.4a(1) of the Act. The Director admitted making the statements.

CWA did not amend nor seek to amend the Complaint to include any alleged unlawful conduct occurring after June 23, 1997.

I will not make findings of fact and law which go beyond the pleadings and substance of the Complaint. See Ocean Cty. College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982).

RECOMMENDED ORDER

I recommend that the Fairview Free Public Library:

A. Cease and desist from:

1. Interfering with, restraining or coercing library employees in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by eliminating holiday pay for part-time library employees and modifying rules for funeral leave during the pendency of a representation petition.

B. Take the following affirmative action:

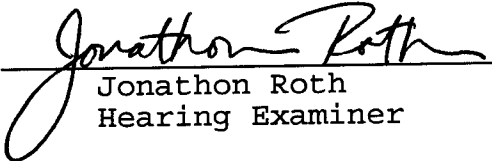
1. Rescind Library Board resolutions of June 23, 1997 eliminating holiday pay for part-time employees and modifying rules for funeral leave.

2. Reinstate holiday pay to part-time library employees, pending completion of collective negotiations with CWA Local 1045.

3. Reinstate rules for funeral leave in effect before July 1, 1997, pending completion of collective negotiations with CWA Local 1045.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Jonathon Roth
Hearing Examiner

Dated: August 3, 1998
Trenton, New Jersey



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating holiday pay to part-time employees and modifying rules for funeral leave during the pendency of a representation petition.

WE WILL rescind Library Board resolutions of June 23, 1997 eliminating holiday pay for part-time employees and modifying rules for funeral leave.

WE WILL reinstate holiday pay to part-time library employees, pending completion of collective negotiations with CWA Local 1045.

WE WILL reinstate rules for funeral leave in effect before July 1, 1997, pending completion of collective negotiations with CWA Local 1045.

Docket No. CO-H-98-28 Fairview Free Public Library
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"